Supreme Court, U.S.
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No. 90-702

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

SHARON E. COOK,
Petitioner,
vs.
BARRATT AMERICAN, INC., and
BRIAN ANGELINI,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION ONE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a nonunion employee's individually accepted agreement to arbitrate a state-law discrimination claim against her employer is enforceable under the Federal Arbitration Act, 9 U.S.C. Sections 1, *et seq*.

RULE 29.1 LIST

Barratt Developments PLC is a parent company of Respondent Barratt American, Inc. Respondent Barratt American, Inc. has no other parent companies or subsidiaries (except wholly owned subsidiaries).

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No. 90-702

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1990

SHARON E. COOK,
Petitioner,
vs.
BARRATT AMERICAN, INC., and BRIAN ANGELINI,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents Barratt American, Inc. ("Barratt") and Brian Angelini (collectively, "Respondents") respectfully oppose the petition for a writ of certiorari (the "Petition") to the California Court of Appeal, Fourth Appellate District (the "Court of Appeal") filed by petitioner Sharon E. Cook ("Cook" or "Petitioner") which was received by Respondents on November 3, 1990.

OPINIONS BELOW

The opinion of the State of California Court of Appeal, Fourth Appellate District, Division One, *Cook v. Barratt American, Inc.*, was initially reported at 219 Cal.App.3d 1004 (1990). A copy of this opinion was

attached to the Petition as Appendix B. This opinion was subsequently ordered "depublished" by the California Supreme Court. Accordingly, pursuant to California Rule of Court 977, the opinion cannot be cited or relied on by a court or a party in another action or proceeding except in very limited circumstances, as is further explained, *infra*. The order of the California Supreme Court denying Cook's petition for review is not reported. A copy of this order was not attached to the Petition; accordingly, a copy of this order is reprinted at Appendix A hereto.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

STATUTES INVOLVED

This case involves the California Fair Employment and Housing Act, California Government Code sections 12900, *et seq*. and the Federal Arbitration Act, 9 U.S.C. sections 1, *et seq*. Copies of the relevant statutes were attached to the Petition as Appendix E.

STATEMENT OF THE CASE

Barratt hired Cook as a new home sales representative on August 1, 1986. On August 8, 1986, Cook read and signed Barratt's standard sales representative employment contract which contained an agreement to submit to arbitration "[a]ny controversy between Broker [Barratt] and Salesperson [Cook] involving . . . the employment of Salesperson," with the decision of the arbitrators to be

"final and conclusive."[1] The employment agreement had a one year term. In July 1987, following expiration of her first employment contract, Cook read and signed another employment agreement for a six-month term running through December 1987. This employment agreement contained an arbitration agreement that was identical to the one in the August 1986 agreement.

In December 1987 Cook resigned her employment. Despite her contractual obligation to arbitrate employment-related claims, Cook filed a complaint against Respondents in the San Diego County Superior Court on May 13, 1988. Three causes of action were alleged in the action: "constructive discharge;" intentional infliction of emotional distress; and pregnancy discrimination in violation of the California Fair

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[1] The arbitration provision in the employment agreement reads as follows:

> "16.1 *Any controversy between Broker and Salesperson involving* the construction or application of any of the terms, provisions, or conditions of this Agreement, or *the employment of Salesperson, shall, on the written request of either party be submitted to arbitration* and such arbitration shall comply with and be governed by the provisions of the California Arbitration Act, beginning at Section 1280 of the California Code of Civil Procedure. The Broker and Salesperson shall each appoint one person to hear and determine the dispute and, if they are unable to agree, then the two persons so chosen shall select a third impartial arbitrator whose *decision shall be final and conclusive upon both parties.* The cost of arbitration shall be borne by the losing party or in such proportion as the arbitrators shall decide." (Emphasis added).

Employment and Housing Act ("FEHA"), California Government Code sections 12940, *et seq.*

In September 1988, Respondents filed a motion in Superior Court to compel arbitration and stay court proceedings pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. sections 1, *et seq.*, and California law. On October 27, 1988, the court denied Respondents' motion and held that Cook's state law discrimination claim was exempt from arbitration under the FAA. Respondents appealed this decision. On April 23, 1990, the Court of Appeal reversed the decision of the Superior Court, and held that the FAA required that the arbitration clause be given effect.

On June 4, 1990, Cook filed a petition for review of the Court of Appeal decision with the California Supreme Court. On July 11, 1990, the California Supreme Court denied the petition to review the Court of Appeal decision and also ordered that the Court of Appeal opinion not be published.

REASONS WHY A WRIT SHOULD NOT BE GRANTED

I.

Petitioner Is Requesting That This Court Review A Lower State Court Opinion That Has No Precedential Effect.

Petitioner requests that this Court review a decision of the intermediate California Court of Appeal. Because the California Supreme Court declined to review the decision of the Court of Appeal, California's highest court has not yet ruled on the issue of whether a

nonunion employee's discrimination claims brought pursuant to the California Fair Employment and Housing Act must be arbitrated pursuant to a private arbitration agreement.

Moreover, the California Supreme Court ordered that the Court of Appeal's opinion be "depublished."[2] Accordingly, the opinion cannot be "cited or relied on by a court or a party in any other action or proceeding except . . . (1) when the opinion is relevant under the doctrines of law of the case, res judicata, or collateral estoppel; or (2) when the opinion is relevant to a criminal or disciplinary action or proceeding because it states reasons for a decision affecting the same defendant or respondent in another such action or proceeding." California Rule of Court 977. The *Cook* opinion therefore has no value as a precedent, and is only of interest to the parties involved in the instant litigation.

II.

The Court Of Appeal Correctly Held That Cook's State Law Based Employment Claims Must Be Compelled To Arbitration.

In reaching its decision that Cook's state law claims of employment discrimination must be compelled to arbitration, the Court of Appeal carefully considered the relevant case law, including the recent series of

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[2] Of note, California Rule of Court 979(e) provides that "[a]n order of the Supreme Court directing depublication of an opinion in the Official Reports shall not be deemed an expression of opinion of the Supreme Court of the correctness of the result reached by the decision or of any law set forth in the opinion."

decisions of the United States Supreme Court emphasizing the strong federal policy of enforcing arbitration agreements. It noted that this Court had held that " 'Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration.' " *Cook*, Petition, Appendix B at 10a, 219 Cal.App.3d at 1009 (quoting *Perry v. Thomas*, 482 U.S. 483, 489, 96 L.Ed.2d 426, 435, 107 S.Ct. 2520, 2525 (1987)). It also cited the United States Supreme Court's observations in *Rodriguez De Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 104 L.Ed.2d 526, 534, 109 S.Ct. 1917, 1920 (1989) that " 'the old judicial hostility to arbitration' " has eroded over the years and that " '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.' " *Cook*, Petition, Appendix B at 12a, 219 Cal.App.3d at 1010.

The Court of Appeal also correctly noted that the FAA mandates enforcement of agreements to arbitrate statutory claims, and that although this mandate can be overridden by a contrary Congressional command, the " 'burden is on the party opposing arbitration . . . to show that Congress intended to preclude a waiver of judicial remedies for the statutory right at issue.' " *Cook*, Petition, Appendix B at 14a, 219 Cal.App.3d at 1011 (quoting *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 227, 96 L.Ed.2d 185, 194, 107 S.Ct. 2332 (1987)). The court in *Cook* thus concluded:

> Considering the strong federal policy to enforce arbitration agreements and the intensified erosion of judicial suspicion about the competence of

> arbitrators to provide for the parties' substantive rights in accord with the applicable law, and considering the absence of any indication in statutory text or history of a congressional indication of intent to preclude a waiver of judicial remedies at least in the first adjudicatory forum of arbitration, we have concluded Cook has not carried her burden of showing the matter is not arbitrable.

Cook, Petition, Appendix B at 14a, 219 Cal.App.3d at 1011.

The Court of Appeal also properly distinguished this Court's decisions in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 39 L.Ed.2d 147, 94 S.Ct. 1011 (1974) and *Barrentine v. Arkansas-Best Freight System, Inc.*, 450 U.S. 728, 67 L.Ed.2d 641, 101 S.Ct. 1437 (1981). In *Alexander*, this Court considered the issue of "the proper relationship between federal courts and the grievance-arbitration machinery of collective-bargaining agreements in the resolution and enforcement of an individual's rights to equal employment opportunities" under Title VII of the Civil Rights Act of 1964, 78 Stat. 252, 42 U.S.C. § 2000e, *et seq.*, ("Title VII"), 415 U.S. at 38, 94 S.Ct. at 1015. This Court held that "the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII." *Id.* at 415 U.S. 59-60.

Similarly, in *Barrentine*, union employees submitted claims for withheld compensation to the grievance-arbitration procedure in their collective bargaining agreement. 450 U.S. at 730-31, 101 S.Ct. at 1439-40. When denied, the employees filed an action in federal court pursuant to the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et seq.*, alleging violation of minimum wage standards. Relying upon *Alexander*, the Court held that prior submissions of the wage claim to the dispute resolution procedure under the union contract did not preclude the FLSA claim in federal court. 450 U.S. at 745-46, 101 S.Ct. at 1447.

Accordingly, in both *Alexander* and *Barrentine*, this Court faced and resolved the tension between collective bargaining with the employer and individual employment rights protected by federal law. As this Court noted in *Alexander*, "the union's exclusive control over the manner and extent to which an individual grievance is presented" might deprive an employment discrimination claimant of a full and fair opportunity to prosecute such claims in an arbitration pursuant to a collective bargaining agreement. 415 U.S. at 58 n.19, 94 S.Ct. at 1024 n.19.

In the case of an individually negotiated arbitration agreement, however, there is no such danger that an employee would be foreclosed from fairly and completely prosecuting his or her discrimination claim through arbitration. In this action, Cook has the opportunity to present her employment discrimination claim independently and through counsel of her choice, unimpeded by the possible conflicting responsibilities of a union as in *Alexander* and *Barrentine*. Therefore, the Court of Appeal in *Cook* properly concluded that because of the crucial union context that was present in *Alexander* and *Barrentine*, those decisions were not

controlling in the instant action. *Cook*, Petition, Appendix B at 21a, 219 Cal.App.3d at 1015.

III.

The Court Of Appeal Did Not Erroneously Distinguish Between Claims Brought Under Title VII And Those Brought Under Parallel State Statutes.

Petitioner contends that the Court of Appeal erroneously distinguished between claims brought under Title VII and those brought under the parallel state statutory scheme. Specifically, she argues that the *Cook* opinion compels arbitration for claims brought under the state anti-discrimination laws but not those brought pursuant to Title VII. See Petition at 13a. This contention is totally without merit because the *Cook* opinion makes no such distinction. Rather, the Court of Appeal decided the specific issue before it by holding that Cook's state law based claims of employment discrimination based on sex must be arbitrated pursuant to the arbitration agreement Cook entered into; the Court of Appeal did not decide the issue of whether any discrimination claims brought pursuant to federal law should also be compelled to arbitration because that issue was not before the court.

In any event, the Court of Appeal did not indicate in its opinion that discrimination claims brought pursuant to federal law would be treated any differently from claims brought pursuant to state law. In fact, the court's holding that Cook's state law claims must be arbitrated may support the conclusion that federal statutory

discrimination claims should also be compelled to arbitration.

IV.

Petitioner's Argument About The Federal Arbitration Act's Interstate Commerce Requirement Is Without Merit.

Cook also contends that the Court of Appeals' decision should be reviewed because the court erroneously applied the FAA although the act's jurisdictional requirement of involvement in interstate commerce had not been met.[3] Petition at 17a. This argument does not constitute a proper ground for this Court's granting a writ of certiorari in this case. In addition, in making this argument, Cook miscites the pleadings in this action. Specifically, in her attempt to convince this Court to grant review of this case because the FAA's jurisdictional requirements were not met, she contends that Barratt "expressly conceded its business was that of selling homes in California." Petition at 17a. However, Barratt never conceded that it *only* sold homes in

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[3] The FAA mandates enforcement of all arbitration provisions found in valid written contracts that involve interstate commerce:

> A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of the contract.

9 U.S.C. § 2.

California or that its activities had no involvement with interstate commerce. To the contrary, from the very beginning of this litigation, Respondents asserted that the interstate commerce requirement was met. For example, in their Memorandum of Points and Authorities in Support of Defendants' Motion to Compel Arbitration and Stay Court Proceedings at pp. 8-10, Respondents explained:

> Contracts of employment are routinely considered contracts 'evidencing a transaction involving commerce.' 9 U.S.C. § 2. *See, e.g., Thorup v. Dean Witter Reynolds, Inc.*, 180 Cal.App.3d 228 (1986) (FAA applied in California court where plaintiff, former account executive, sued employer brokerage firm for wrongful termination of employment contract) .... Further, the sale of residential property, for which Barratt hired plaintiffs, affects interstate commerce significantly .... Barratt advertises its homes in states other than California, as well as in international markets, and many buyers of Barratt's homes, as well as other residential property in California, are from other states and other countries.

As the Court of Appeal noted, Cook never raised the question of whether her employment contract involved interstate commerce until she filed a petition for rehearing of the Court of Appeal decision. The Court of Appeal thus properly concluded that her belated attempt to raise this issue for the first time in her Petition for Rehearing should be rejected. See Court of Appeal

Order Modifying Opinion and Denying Petition for Rehearing (which is reprinted at Appendix B hereto).

V.

The Cook Decision Has Not Created Irreconcilable Differences Among The California Appellate Courts.

In order to support her argument that the courts have reached inconsistent results on the issue of whether arbitration clauses in private employment agreements will be enforced, Petitioner argues that *Cook* and another California appellate decision, *Hall v. Nomura Secur. Int'l.*, 219 Cal.App.3d 43, 268 Cal.Rptr. 45 (1990), "came to inconsistent results." Petition at 6a. Specifically, Petitioner asserts that in *Hall* "the court held employees need *not* arbitrate their state employment discrimination claims under private employment agreements if the right in issue is protected under Title VII." Petition at 6a. This statement mischaracterizes the decision in *Hall*.

In *Hall*, the Court of Appeal considered whether an employee's claims that he was wrongfully terminated because of his age and medical condition in violation of FEHA must be compelled to arbitration pursuant to an arbitration agreement that the employee had signed. The employee's principal argument on appeal was that because his cause of action was statutorily based, he was not bound by the arbitration agreement. 219 Cal.App.3d at 48. The Court of Appeal rejected the employee's arguments, and held that his claims concerning unlawful employment practices under FEHA must be compelled to arbitration pursuant to the FAA. *Id.* at 49-50. Thus, the

unanimous holding of *Hall* is completely consistent with the holding of the Court of Appeal in the instant case; in both cases, the courts held that the employees' state law claims concerning alleged unlawful employment practices must be compelled to arbitration.[4]

Moreover, another California appellate decision also supports the *Cook* decision. Specifically, in *Baker v. Aubry*, 216 Cal.App.3d 1259, 265 Cal.Rptr. 381 (1989), *cert. denied*, __ U.S. __, 112 L.Ed.2d 40, 111 S.Ct. 66 (1990), the court held that under the FAA, a claim for overtime pay under state law was subject to compulsory arbitration pursuant to a private arbitration agreement. In reaching this conclusion, the court rejected an employee's contention that because her right to overtime pay is statutory in nature, it may not be waived by an agreement to arbitrate. The court in *Baker* concluded that the FAA preempts the relevant California Labor Code provisions, and that the FAA, which strongly favors the enforcement of arbitration agreements, requires that the employee's claims be arbitrated. *Id.* at 1266-67.

Accordingly, there is no split in the California Courts of Appeal. Rather, the Courts of Appeal in *Cook, Hall*, and *Baker* have distinguished *Alexander* and *Barrentine*, and have consistently held that California employment statutes are preempted by the FAA and that employees' agreements to arbitrate employment-related disputes will

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[4] While the court in *Hall* quoted language from the opinion of the Federal Court of Appeals for the Eight Circuit in *Swenson v. Management Recruiters International, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, ___U.S. ___, 110 S.Ct. 143, 107 L.Ed.2d 102 (1989), in which the Eighth Circuit concluded that judicial enforcement of Title VII and Minnesota state employment claims based on race and sex is not precluded by the FAA, the Court of Appeal in *Hall* did not follow the rationale and holding of *Swenson*.

be given effect in light of the strong federal policy in favor of arbitration.

VI.

This Court's Granting Review Of The Decision In *Gilmer v. Interstate/ Johnson Lane Corp.* Does Not Mandate That Review Be Granted In The Instant Case.

On October 1, 1990, this Court granted review in *Gilmer v. Interstate/Johnson Lane Corp.*, No. 90-18, to consider the issue of whether claims brought pursuant to the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, *et seq.*, may be subjected to compulsory arbitration pursuant to an employment agreement. 59 U.S.L.W. 1049 (October 2, 1990). In the federal appellate decision below in *Gilmer*, 895 F.2d 195 (4th Cir. 1990), the court held that an employee's claim for violation of ADEA could be compelled to arbitration pursuant to an agreement between the employee and his employer which required arbitration of all claims arising out of employment. This decision was squarely in conflict with the Third Circuit's opinion in *Nicholson v. CPC International, Inc.*, 877 F.2d 221 (1989) (holding that the FAA does not require ADEA claims to be arbitrated pursuant to a private arbitration agreement).

The question of whether ADEA claims may be subjected to compulsory arbitration is not an issue in the instant litigation. Consequently, *Gilmer* is not directly controlling here. *Cf. Swenson v. Management Recruiters International, Inc.*, 858 F.2d 1304 (8th Cir. 1988), *cert. denied*, __ U.S. __, 110 S.Ct. 143, 107 L.Ed.2d 102 (1989) (holding that the FAA does not require

employment discrimination claims brought pursuant to Title VII and Minnesota state law to be arbitrated pursuant to a private arbitration agreement). Although the same general principles may apply to resolving the issue of whether ADEA claims may be subjected to compulsory arbitration in *Gilmer* and the issue of whether California FEHA claims may be subjected to compulsory arbitration in the instant action, this Court has previously indicated that it is necessary to conduct a separate inquiry into each statutory scheme. Specifically, this Court has explained that the courts must examine the statutory scheme at issue in order to ascertain whether Congress intended "to preclude a waiver of judicial remedies for the statutory rights at issue," and that this determination must be made " 'from [the statute's] text or legislative history' " of the statute or from " '. . . an inherent conflict between arbitration and the statute's underlying purposes.' " *Shearson*, 107 S.Ct. at 2337 (citing *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628, 105 S.Ct. 3346, 3355 (1985)). Consequently, because different statutory schemes are at issue in *Gilmer* and in the instant case, the fact that this Court granted review in *Gilmer* does not mandate that it also grant review in this case or that it hold this case pending resolution of *Gilmer*.

VII.

In The Alternative, If This Court Decides That It Is Not Appropriate To Deny The Petition For Certiorari In This Case In Light Of *Gilmer*, Respondents Respectfully Request That The Instant Action Be Consolidated With *Gilmer*.

Alternatively, Respondents respectfully request that the instant action be consolidated with *Gilmer* if this Court decides that it is not appropriate to deny the petition for writ of certiorari in this case in light of this Court's grant of review in *Gilmer*. Because the same general principles may apply to the examination of the two discrete statutory schemes at issue in *Gilmer* and the instant case, it may be most expedient for this Court to decide the two issues at the same time.

CONCLUSION

Respondents Barratt American, Inc. and Brian Angelini respectfully request that Cook's petition for a writ of certiorari be denied.

DATED: November 28, 1990

Respectfully submitted,

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BARRATT AMERICAN, INC.,
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APPENDIX A

APPENDIX A

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
Fourth Appellate District, Division One,
No. D009230 - S015941

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN BANK

SUPREME COURT
FILED
JUL 11 1990
Robert Wandruff Clerk
Deputy

SHARON E. COOK et al., Respondents
v.
BARRATT AMERICAN INCORPORATED
ETC. et al., Appellants

Respondents' petition for review DENIED.

Mosk, J. and Broussard, J. are of the opinion the petition should be granted.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above entitled appeal filed April 23, 1990, which appears at 219 Cal.App.3d 1004. (Cal. Const., Art. VI, Section 14; Rule 976, Cal Rules of Court.)

PANELLI
Acting Chief Justice

APPENDIX B

COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

FILED
Stephen M. Kelly Clerk
MAY 21 1990
Court Of Appeal Fourth District

SHARON E. COOK et al.,
Plaintiffs and Respondents,
v.
BARRATT AMERICAN, INC.,
etc., et al.,
Defendants and Appellants.

ORDER MODIFYING OPINION AND
DENYING PETITION FOR REHEARING
D009203
(Super. Ct. No. 599183)

THE COURT:

The opinion filed on April 23, 1990, is modified as follows:

1. On page 7, the text of footnote 5 is deleted and the following text is substituted therefor: Until Cook filed a petition for rehearing in this case, there was no question raised that the employment contract involves interstate commerce and is not subject to revocation. In the petition for rehearing, for the first time in this case, Cook raises an issue about involvement in interstate commerce. (See *McLain v. Real Estate Bd. of New Orleans* (1979) 444 U.S. 232; cf. *Bernhardt v. Polygraphic Company of America* (1956) 350 U.S. 198.)

By Cook's silence on this point until the filing of the petition for rehearing, the question has been waived. (See *Parker v. City of Fountain Valley* (1981) 127 Cal.App.3d 99, 117; *In re Joseph E.* (1981) 124 Cal.App.3d 653, 657.).

2. On page 22, after the second full paragraph, insert the following new paragraph: Pursuant to Barratt's motion, the trial court must stay the proceedings in the superior court and order the parties to arbitrate the matter.

3. On page 22, the Disposition sentence should now read: Order reversed and remanded for further proceedings consistent with the views expressed in this opinion.

The petition for rehearing is denied.

/s/ Todd
TODD, Acting P.J.

Copies to: All parties